



## DEPARTMENT OF COMMERCE

### Economic Development Administration

#### 13 CFR Part 300

[Docket No.: 210916-0191]

RIN 0610-AA82

#### Permitting Additional Eligible Tribal Entities

**AGENCY:** Economic Development Administration, U.S. Department of Commerce.

**ACTION:** Final rule.

**SUMMARY:** Through this final rule, the Economic Development Administration (EDA), U.S. Department of Commerce, expands the definition of Tribal entities eligible to receive grants under the Public Works and Economic Development Act of 1965 (PWEDA) to include for-profit Tribal corporations so long as they are wholly owned by, and established exclusively for the benefit of, a Tribe.

**DATES:** This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mara Quintero Campbell, Senior Advisor, email: [MCampbell@eda.gov](mailto:MCampbell@eda.gov), telephone: (202) 603-9960, or Jeffrey Roberson, Chief Counsel, email: [JRoberson@eda.gov](mailto:JRoberson@eda.gov), telephone: (202) 482-1315, Economic Development Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Suite 72023, Washington, DC 20230.

#### SUPPLEMENTARY INFORMATION:

##### Background

##### *History of EDA's Definition of Eligible Tribal Entities*

When Congress created EDA in 1965, it recognized the unique economic needs of American Indian Nations (AINs or Tribes) and carved out a special provision within

PWEDA that authorized Indian Tribes to be eligible for a 100% grant rate, across all of EDA's PWEDA programs. 42 U.S.C. 3144(c)(1). No other category of eligible entity is provided such broad flexibility with regard to grant rate under PWEDA.

PWEDA defines "Indian Tribe" as any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or Regional Corporation (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. 42 U.S.C. 3122(7).

EDA has long recognized that AINs have diverse organizational, governance, and operating structures. In deference to the special government-to-government relationship that exists between the U.S. Government and AINs and recognizing their sovereign interest in determining their own organizational arrangements, EDA has historically interpreted the term "Indian Tribe" broadly to include a range of Tribally controlled entities in addition to the AIN's primary governing body. EDA's regulations, codified at 13 CFR 300.3, therefore provide that the term "Indian Tribe" includes the governing body of an Indian Tribe, non-profit Indian corporation (restricted to Indians), Indian authority, or other non-profit Indian tribal organization or entity; provided that the Indian tribal organization or entity is wholly owned by, and established for the benefit of, the Indian Tribe or Alaska Native Village.

For over 45 years, EDA's regulations have limited the types of organizations included within the term "Indian Tribe" to non-profit Tribal organizations. The word non-profit first appeared in EDA's regulations in 1973 to condition the term

“corporation.” In 1999, EDA further modified the definition and added a second use of “non-profit” to serve as an overarching descriptor to the entire list of eligible entities.<sup>1</sup>

There is no background preamble language or other documentation that EDA has found that explains EDA’s reasoning at that time for including “non-profit” as a limitation in these two instances. As a result of the use of the term “non-profit” in the regulations, however, for-profit Tribal entities have been found ineligible for EDA Tribal funds.

### *Need for Revised Definition*

While EDA has a long history of supporting AINs, the agency has also seen a stagnation in funding to Tribes even while there is broad recognition that these communities are among the most economically distressed in the country. To address this gap, EDA has identified several internal and external actions it can take to strengthen its work with AINs. One action is to extend EDA Tribal eligibility to include additional entities beyond those already included in the definition, specifically for-profit entities that are wholly owned by and established for the benefit of the Tribe, which, as noted above, is currently prohibited by EDA regulation.

Over the past decade, EDA has seen an increase in applications from for-profit Tribal entities. These applications were often submitted by Tribal corporations chartered under Section 17 of the Indian Reorganization Act (25 U.S.C. 477) (also referred to as “Section 17 corporations”), limited liability corporations organized under state or Tribal law, or other similar structures. This increase tracks both the evolution of these entities and their expanding economic development role within Tribes.

Under Federal policies of self-determination, Tribes play a similar role as state and local governments and are generally responsible for providing basic services within

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<sup>1</sup> Since its first inclusion in 1973, the definition of Indian Tribe has undergone a number of other changes, primarily combining what was previously two separate definitions of Alaska Native and other Tribes into one all-encompassing definition reflected in the 1999 update.

the Tribe (e.g., roads, water, electricity, and telecommunications).<sup>2</sup> To generate revenue to provide these services, Tribes can create corporations to participate in the private marketplace through tourism, manufacturing, and services sectors.<sup>3</sup>

Tribal corporations are distinct from ordinary “for-profit” entities. Tribal corporations may be organized under Federal law and granted the same legal protections and advantages as the Tribe itself. Depending on their structure and place of operation, Tribally owned for-profit entities may also enjoy the Tribe's sovereign immunity from lawsuits, exemption from certain Federal and state taxes, or exemption from otherwise-applicable state laws. Most importantly from EDA’s perspective, many of these entities are furthering the long-term economic development of AINs.

Such corporate entities can be owned by the Tribe or they may have non-Indian business partners. Under this update to EDA’s regulations, EDA will only authorize for-profit entities that are wholly owned and managed by the Tribe to be eligible for EDA Tribal funding, thereby ensuring the EDA investment directly and principally benefits the Tribe. As is currently the case, EDA will verify the status largely through a review of articles of incorporation, business charters, and other formation documents.

#### *Results of Tribal Consultations on EDA’s Proposal to Update Regulation*

EDA conducted extensive Tribal consultations under Executive Order 13175 (Nov. 6, 2000) regarding the change to the regulations provided in this final rule. On April 6, 2021, EDA sent a letter requesting consultation with Tribal Leaders to the Tribal Leaders of existing EDA grantees, national and regional Tribal Organizations, and entities and persons on the White House Tribal Affairs email listserv. This notice was

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<sup>2</sup> Harvard Project on American Indian Economic Development (HPAIED) COVID Letter to Treasury, April 10, 2020. [https://ash.harvard.edu/files/ash/files/hpaied\\_covid\\_letter\\_to\\_treasury\\_04-10-20\\_vsIGNEDvfinv02.pdf?utm\\_medium=Email&utm\\_campaign=HPAIED+COVID+Recommendations&utm\\_source=Press](https://ash.harvard.edu/files/ash/files/hpaied_covid_letter_to_treasury_04-10-20_vsIGNEDvfinv02.pdf?utm_medium=Email&utm_campaign=HPAIED+COVID+Recommendations&utm_source=Press).

<sup>3</sup> Tribal Business Structure Handbook. Office of Indian Energy and Economic Development, Department of Interior, I-1.

also posted on EDA's website. EDA leadership held two virtual meetings with Tribal representatives on April 16 and 19, 2021. In addition, EDA accepted comments on the proposal by email and voicemail through April 28, 2021.

AINs participating in the consultation were broadly supportive of the change. Several AINs commented that allowing Tribally owned for-profit organizations to be eligible for EDA grants would increase Tribal access to economic development opportunities and support long-term prosperity. One letter noted:

Expanding the EDA tribal eligibility to include wholly-owned for-profit tribal corporations, arms of the tribe, limited liability companies, organizations, and other tribal entities would go a long way toward increasing tribal access to economic development opportunities for our communities. For many tribes, such entities are tasked with the specific purpose of creating economic development for tribal communities. Without a tax base, tribally-owned corporations, economic development organizations, and other entities must generate critical tribal revenue to provide important governmental services to our members.

Many other AINs made similar comments in support of the change provided in this final rule. Several AINs also noted that Tribally owned businesses are often major employers for Tribal communities and that extending EDA eligibility to these organizations would support job growth.

Some AINs supported the change, encouraging EDA to extend eligibility to all forms of Tribally owned corporations, whether chartered under Tribal or state law. Other commenters urged EDA to take care to ensure that the benefits of for-profit activity are in fact flowing back to a Tribe and its members before extending eligibility. Commenters also suggested that EDA provide clear guidance on how it would make eligibility determinations.

Under the new definition of "Indian Tribe," a for-profit entity may be eligible for EDA assistance provided that it is wholly owned by a Tribe and organized for the benefit of the Tribe. Eligibility is not limited to any particular type of entity. Indian corporations, Section 17 corporations, state-chartered corporations, and Limited Liability Corporations

(among others) are all potentially eligible. EDA intends to verify both that the for-profit entity is wholly owned by a Tribe and that the entity is organized for the benefit of that Tribe before extending eligibility. EDA anticipates that these determinations will largely be made on the basis of corporate organizational documents (e.g., charters, by-laws), but will also look to other sources, as needed, to verify eligibility. Because EDA does not currently have experience with examining the eligibility of Tribal for-profit entities, EDA will initially consider eligibility on a case-by-case basis. EDA will communicate openly with affected Tribes to ensure that its eligibility determinations take account of all relevant considerations.

Some AINs expressed concerns regarding the change to the regulations provided in this final rule. Some commenters cautioned that, if EDA extended eligibility to for-profit entities, smaller and less well-resourced Tribes would be disadvantaged in competition for EDA funding. EDA appreciates this concern and will take steps when reviewing applications to ensure that applications from smaller tribes receive proper attention. Because economic development need is always an important consideration in funding decisions, EDA does not believe that larger tribes with associated for-profit entities will necessarily have an advantage over smaller tribes in the competitive process. Nonetheless, EDA will monitor the distribution of funding and make adjustments to its application review process, as necessary, to ensure that funding is distributed equitably..

Other commenters expressed particular concern that the change provided in this final rule would make Alaska Native Corporations (ANCs) eligible for EDA funding. The eligibility of ANCs for EDA funding is governed by the language of PWEDA, however, and is therefore not within the scope of this action and not affected by this final rule. Based on the Supreme Court's recent decision in *Yellen v. Confederated Tribes of the Chehalis Reservation*, 121 S. Ct. 2434 (2021), EDA has determined that ANCs fall within PWEDA's definition of "Indian Tribe."

## *Regulation Change*

To enable for-profits that are wholly owned by, and established for the benefit of, the Indian Tribe to be eligible for EDA Tribal funding, this final rule changes EDA's regulation by deleting the first instance of "non-profit" where it appears in the second sentence of the definition at 13 CFR 300.3, so that "non-profit" no longer modifies the type of "Indian corporation (restricted to Indians)" that is eligible. This final rule also adds ", corporation" in the proviso to the second sentence to ensure that any such corporation must be wholly owned by, and established for the benefit of, the Tribe.

As noted above, this change has no effect on the eligibility of ANCs, which are separately identified in PWEDA's definition of "Indian Tribe."

## **Classification**

### **Administrative Procedure Act and Regulatory Flexibility Act**

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action because EDA formally consulted AINs on this change in accordance with Executive Order 13125, and AINs are the only affected entities. Additional public comment would therefore serve no purpose and is unnecessary. There is also good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness. Expanding eligibility of Native American communities is urgent given the current availability of funds for such communities under the American Rescue Plan Act (ARPA) of 2021 (Pub. L. 117-2). Expanding eligibility within Native American communities as accomplished by this rule is critically necessary to ensure the benefits of ARPA effectively reach those communities and that they are able to equally take part in the economic recovery from the pandemic.

Because prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory

Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

### **Executive Orders 12866 and 13563**

The Office of Management and Budget (OMB) has determined that this rule is not significant for purposes of Executive Order 12866.

### **Congressional Review Act**

This final rule is not major under the Congressional Review Act (5 U.S.C. 801 *et seq.*).

### **Executive Order 13132**

This final rule does not contain policies that have federalism implications.

### **Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (“PRA”) requires that a Federal agency consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from OMB for each collection of information it conducts, sponsors, or requires through regulations. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the PRA unless that collection displays a currently valid OMB Control Number. This final rule does not require the collection of any information.

### **List of Subjects in 13 CFR Part 300**

Organization and functions (Government agencies), Reporting and recordkeeping requirements.

For the reasons discussed above, EDA is amending title 13, chapter III of the Code of Federal Regulations as follows:



## **PART 300—GENERAL INFORMATION**

1. The authority citation for part 300 continues to read as follows:

**Authority:** 42 U.S.C. 3121; 42 U.S.C. 3122; 42 U.S.C. 3211; 15 U.S.C. 3701;

Department of Commerce Organization Order 10-4.

2. Amend § 300.3 by revising the definition of *Indian Tribe* to read as follows:

### **§ 300.3 Definitions.**

\* \* \* \* \*

*Indian Tribe* means an entity on the list of recognized tribes published pursuant to the Federally Recognized Indian Tribe List Act of 1994, as amended (Pub. L. 103-454) (25 U.S.C. 479a *et seq.*), and any Alaska Native Village or Regional Corporation (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*). This term includes the governing body of an Indian Tribe, Indian corporation (restricted to Indians), Indian authority, or other non-profit Indian tribal organization or entity; provided that the Indian tribal organization, corporation, or entity is wholly owned by, and established for the benefit of, the Indian Tribe or Alaska Native Village.

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Dated: September 20, 2021.

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